

Dear Committee,

Joint submission from Disability Representative Organisations to the Community Affairs Legislation Committee

Thank you for the opportunity to make a further submission relating to the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024.

Introduction

A group of national Disability Representative Organisations made a joint submission to this Committee's earlier inquiry into the Bill, which made a wide range of recommendations.¹ Individual organisations also made several well-detailed and extensive submissions relating to issues of particular concern for their communities.²

This additional submission is intended to provide our response to the most recent amendments³ that have come before the Parliament since the original inquiry and identify ongoing areas of concern.

Recommendations

We strongly urge the Government to adopt the following recommendations as a matter of urgency:

Whole-of-person

Recommendation 1: that the legislation be amended to:

- a) allow people to have additional impairments listed as having met the access criteria, in addition to the impairments through which they entered the scheme; and
- b) include a requirement that a person's eligible impairments (and what criteria they met) are listed in their plan under sections 32D and 33 and when provided access.
- c) make these decisions reviewable.

Recommendation 2: that the legislation be amended to make a decision to remove a condition from a person's file reviewable.

CEO Powers

Recommendation 3: that the legislation be amended to ensure section 43 and 46 are better defined, including what constitutes "physical mental or financial harm" as well as assess

¹ Disability Representative Organisations (National Co-Ordination Function), Submission no. 60 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]*

² See submissions no. 21, 53, 54, 58, 132, 135, 153 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]*

³ Government, Amendment Sheet PA112 (Revised) raised in Senate to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*.

whether the risk would be reduced with additional support and what constitutes a breach of section 46. These powers should also be limited to only be implemented in the event of 'wilful and repeat non-compliance.'

Recommendation 4: amend other information requests in section 30, 30A, and 36 so that requests cannot be made where it would be unduly burdensome for a person to respond to, and that such requests invalidate a subsequent decision to revoke a person's status as a participant.

Pathway for Re-Assessment

Recommendation 5: that the legislation be amended to ensure draft copies of the assessment and plans be provided to participants before being formalised so that the participant can respond.

Recommendation 6: that the re-assessment procedure is explained in the legislation, rather than delegated to the rules, providing a clear and straightforward pathway for people to be granted a second assessment if they are unhappy with the first assessment.

Co-Design

Recommendation 7: that the legislation be amended to clarify that instruments provided to Parliament do not come into effect until the disallowance period passes and the rules and determinations can be viewed by the public.

Recommendation 8: that the legislation be amended to directly include a duty to consult with DROs and the community with reasonable timeframes for response.

Background

Our organisations released a joint statement on June 21, 2024, with clear priorities for further amendments to the NDIS Bill. These included the whole of person issues, and stronger measures for co-design.

We have also appeared before the Community Affairs committee several times, to outline our concerns, and to suggest a range of further amendments that would address flaws in this legislation.

Our organisations have been working with the National Disability Insurance Agency (the Agency), the Department of Social Services and the Justice and Equity Centre (formerly the Public Interest Advocacy Centre) to address our concerns about the whole-of-person issues, and we believe the proposed amendment reflects a more satisfactory outcome.

Whole-of-Person

The Government has recently introduced amendments in the Senate to provisions detailing how funds can be provided through the new needs assessment.⁴ One of our initial concerns about the Bill was that, provisions in the Bill would require assessors to dissect a person's

⁴ Government, Amendment Sheet PA112 (Revised) to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 6-11.

support needs between impairments that did and did not meet the access criteria, notwithstanding that the Bill was said to introduce a whole-of-person approach in the explanatory memorandum.⁵

A new government amendment removes the direct tying of funds to only NDIS-eligible impairments and requires the Minister to consider environmental factors and how other impairments affect and impact the condition for which someone has got access through the operation of a note to section 32L.⁶ This new government amendment is a substantial improvement and goes some way to matching the reality of how people require support needs in relation to their disability.

We submit there is a need for clarity about the status of particular impairments for people who use the NDIS. This should be something clearly identified and made apparent to the participant and listed in their plans.

People should also have a mechanism to appeal a decision to determine that a particular impairment, just like they do when they are rejected from accessing the scheme in the first place. Without it, there is a risk that people's listed impairments could change from plan review to plan review and offer little in the way of stability.

The process to determine access is also a substantially different one to the needs assessment that will need to take place. Where a needs assessment is intended to capture a person's support needs, the current wording would also require them to undertake more medical assessments like whether a particular condition is permanent.

Recommendation 1: that the legislation be amended to:

- a) allow people to have additional impairments listed as having met the access criteria, in addition to the impairments through which they entered the scheme; and
- b) include a requirement that a person's eligible impairments (and what criteria they met) are listed in their plan under sections 32D and 33 and when provided access.
- c) make these decisions reviewable.

Recommendation 2: that the legislation be amended to make a decision to remove a condition from a person's file reviewable.

CEO Powers

Based on Committee recommendations, the Government has introduced amendments regarding how people would be treated when they do not comply with a request for information from the Agency.⁷

These amendments would require the Agency to consider whether, among other factors, this was the first time someone was not able to comply, their history of compliance and whether there were other external factors that contributed to the delay in the provision of information.⁸

⁵ n 1, 10.

⁶ Government, Amendment Sheet PA112 (Revised) to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 6-11.

⁷ Government, Amendment Sheet PA112 (Revised) in Senate to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 1-5.

⁸ *Ibid*, cl 5 and 6.

An earlier set of amendments made it clear that requests to undergo examination should only apply where information could not be obtained another way.⁹ These are positive amendments to the bill.

We are however, eager to see more controls placed on the exercise of information request powers in the first instance. These amendments, while positive, mainly relate to times where someone has not been able to comply with a request made by the Agency (with the exception of examinations). We would recommend further changes that address other powers that the NDIS holds, particularly around plan management.

In our initial submission, we flagged our concerns around the operation of section 43 and 46, which regulates the type of plan management that a person can have in their plan. These are still outstanding and present risks for people's choice and control over their plans. A potential set of constraints has been suggested by Dr Darren O'Donovan, which suggested that such controls only be implemented when a threshold of 'wilful, repeat non-compliance' is met, as well as requiring an assessment of whether the situation could be addressed with decision-making support.¹⁰

Similar limits to those previously introduced in the government amendments above should also extend to the other information government requests in section 30, 30A and 36, not just those where medical assessments are required. A threshold of requesting information where not 'unduly burdensome' has been proposed by others and seems a reasonable way of ensuring that information requests do not place even more administrative burden on users in an already complex scheme.¹¹

Additionally, if the thresholds are to be genuinely meaningful, the legislation must also be amended to enshrine the rights of participants if it is later concluded that the CEO fell short of the threshold requirements.

It should be made abundantly clear that, if a decision to revoke a person's status as a participant is reviewed, then the prior occurrence of an improper request for information will invalidate the CEO's decision, regardless of whether or not the participant complied. Participants must have a genuine remedy, including in circumstances where they do (either reluctantly or due to lack of knowledge) comply with an improper request.

Recommendation 3: that the legislation be amended to ensure sections 43 and 46 are better defined, including what constitutes "physical mental or financial harm" as well as assess whether the risk would be reduced with additional support and what constitutes a breach of section 46. These powers should also be limited to only be implemented in the event of 'wilful and repeat non-compliance.'

Recommendation 4: amend other information requests in section 30, 30A, and 36 so that requests cannot be made where it would be unduly burdensome for a person to respond to,

⁹ Government, Amendment Sheet PA110 in House to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 1-4.

¹⁰ Dr Darren O'Donovan, Submission no. 56 to Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]*, 30-32.

¹¹ Public Interest Advocacy Centre, Submission no. 57, to Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 [Provisions]*, 32-33; Supplementary submission at 4-5.

and that such requests invalidate a subsequent decision to revoke a person's status as a participant.

Pathway for Re-Assessment

There have also been amendments relating to the process of obtaining a replacement assessment, though the details are still scant.

In amendments made in the House, the Government has clarified that there is scope for further needs assessments to be made through the internal and external review processes.¹² However, it is still not clear what criteria would trigger a further needs assessment for a person and this is yet again deferred to the rules.¹³

Given the justification for placing the process around replacement assessments in the rules was to incorporate new assessment tools as they are developed,¹⁴ this more foundational element needs to be spelled out in the legislation itself. We are eager for the re-assessment to be available to people with a minimum of fuss and hassle and with as few administrative barriers as possible.

We also submit that there should be a procedure to provide people with draft copies of the needs assessment report and the plans that are developed, which is a long-standing request from our community. We believe this would significantly strengthen the operation of the scheme. In particular, an opportunity to review the needs assessment with the person involved could help to catch and amend obvious errors and reduce the number of times where a full re-assessment is required.

This would also assist with reducing the number of "change of circumstance" requests that are currently increasing, often due to small but substantial errors in the original plans.

Recommendation 5: that the legislation be amended to ensure draft copies of the assessment and plans be provided to participants before being formalised so that the participant can respond.

Recommendation 6: that the re-assessment procedure is explained in the legislation, rather than delegated to the rules, providing a clear and straightforward pathway for people to be granted a second assessment if they are unhappy with the first assessment.

Co-Design

Amendments relating to co-design have been introduced in the Senate and now require the Minister to detail their consultation with groups when lodging legislative instruments.¹⁵ This

¹² Government, Amendment Sheet PA110 in House to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 1.

¹³ Government, Amendment Sheet SK113 in House to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 1.

¹⁴ Explanatory Memorandum, *Back on Track Bill*, 22-23.

¹⁵ Government, Amendment Sheet PA112 (Revised) in Senate to *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, cl 18.

follows a recommendation from the Committee in their first review of this Bill.¹⁶ This is another positive change.

We reiterate our position that people with disability must play a leadership role in the design and implementation of these reforms. In this respect, we are seeking a good faith commitment from the Government to work with the community and ensure that these new measures are co-designed and trialled and do not leave anyone behind.¹⁷

These provisions would be further strengthened by providing additional time for review of legislative rules by the Senate before they come into effect in line with the disallowance period, as well as a direct requirement for the Government to consult with the community and Disability Representative Organisations within the legislation,¹⁸ as opposed to just referring to the *Legislation Act*.

Recommendations:

Recommendation 7: that the legislation be amended to clarify that instruments provided to Parliament do not come into effect until the disallowance period passes and the rules and determinations can be viewed by the public.

Recommendation 8: that the legislation be amended to directly include a duty to consult with DROs and the community with reasonable timeframes for response.

Our organisations

This submission was coordinated by Disability Advocacy Network Australia (DANA) in their role as National Coordination Function for the Disability Representative Organisations program. Disability Representative Organisations are funded by the Department of Social Services to represent people with disability.

The following organisations have endorsed this joint submission:

- Australian Autism Alliance (AAA)
- Australian Federation of Disability Organisations (AFDO)
- Community Mental Health Australia (CMHA)
- Children and Young People with Disability Australia (CYDA)
- Down Syndrome Australia (DSA)
- First Peoples Disability Network (FPDN)
- Inclusion Australia (IA)
- National Ethnic Disability Alliance (NEDA)
- Physical Disability Australia (PDA)
- Women with Disabilities Australia (WWDA)

¹⁶ n 1, 8-9.

¹⁷ Ibid, 3-4; Australian Federation of Disability Organisations, Children and Young People with Disability Australia, Disability Advocacy Network Australia et al, 'NDIS Change must be led by people with disability – Joint Media Statement' <<https://www.dana.org.au/ndis-review-joint-media-statement/>>.

¹⁸ Ibid, 4; see also Dr Darren O'Donovan, n 11, 8-9. Public Interest Advocacy Centre, supplementary submission to submission number 57, 2-3.